

(March 1999 version)

CID LETTER - appears at pages III 63 - 64 (fn 143) of the published version of the 1998 Division Manual (page numbers are not identical on Internet nor Intranet versions). You may delete paragraph 2 of the following letter if the CID recipient has not requested notice before its documents are used in a deposition and you have no reason to doubt that he/she understands that documents can be used in CID depositions without notice to the producing party.

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Dear Mr./Ms. Lawyer:

In your letter of [Date] you requested additional assurances of confidentiality beyond those provided in the Civil Investigative Demand ("CID") statute, 15 U.S.C. §§ 1311-1314, and the Freedom of Information Act ("FOIA"), 5 U.S.C. §552, for documents called for by the CID recently served upon [Company Name].

I cannot promise to notify you in advance if a document [Company Name] provided will be used in a CID deposition of a witness not affiliated with your client. The Division is authorized to use CID material without the consent of the producing party in "connection with the taking of oral testimony." It is, however, rare that we disclose a document in such a manner. Although it is occasionally useful to use CID materials in a deposition of a third party where the third party has already seen the materials, or is at least generally aware of their substance, it is rarely necessary to use CID materials in connection with a deposition of a third party that is unfamiliar with the contents of those materials. Moreover, the Division has an interest in seeing that competitors do not receive access to each other's confidential information, is sensitive to confidentiality concerns, and does not unnecessarily reveal such information.

You have also represented that [Company Name] considers certain information requested in the CID to be proprietary and confidential. It is the Department's policy to treat confidential business information that is produced as set forth below. "Confidential business information" means trade secrets or other commercial or financial information (a) in which (the company) has a proprietary interest, and (b) which (the company) in good faith designates as commercially or financially sensitive.

It is the Department's policy not to use confidential business information in complaints and accompanying court papers unnecessarily. The Department, however, cannot provide assurance that confidential business information will not be used in such papers, and cannot assure [Company Name] of advance notification of the filing of a complaint or its contents.

If a complaint is filed, it is the Department's policy to notify [Company Name] as soon as is reasonably practicable should it become necessary to use confidential business information for the purpose of seeking preliminary relief. It is also the Department's policy to file under seal any confidential business information used for such purpose, advise the court that [Company Name] has designated the information as confidential, and make reasonable efforts to limit disclosure of the information to the court and outside counsel for the other parties until [Company Name] has had a reasonable opportunity to appear and seek protection for the information.

It is the Department's further policy to notify [Company Name] at the close of the investigation and give it the option of requesting that original documents, if produced, be returned. If copies were produced they will be destroyed unless: (1) they are exhibits; (2) they are relevant to a current or actively contemplated Department investigation or to a pending Freedom of Information Act request; (3) a formal request has been made by a state attorney general to inspect and copy them pursuant to Section 4F of the Hart-Scott-Rodino Antitrust Improvements Act, 15 U.S.C. § 15; or, (4) they will be of substantial assistance in the Department's continuing law enforcement responsibilities.

Sincerely,

Pat Attorney